

23336

✓K ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CONTRAN CORPORATION, a Delaware
Corporation,

Plaintiff,

v.

THE TRAVELERS INDEMNITY COMPANY,
a corporation; PHOENIX INSURANCE
COMPANY, a corporation, THE CHARTER
OAK FIRE INSURANCE COMPANY, a
corporation; THE TRAVELERS INDEMNITY
COMPANY OF ILLINOIS, a corporation,
THE TRAVELERS INDEMNITY COMPANY
OF CONNECTICUT f/k/a TRAVELERS
INDEMNITY COMPANY OF RHODE
ISLAND, a corporation; THE TRAVELERS
INDEMNITY COMPANY OF AMERICA, a
corporation; TRAVELERS INDEMNITY
COMPANY, a corporation, ST. PAUL
TRAVELERS, n/k/a THE TRAVELERS
COMPANIES, INC., a corporation,

Defendants.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

FILED

JUL - 8 2008

CLERK, U.S. DISTRICT COURT

By

Deputy

Case No.

3-08 CV 1149-K

ORIGINAL COMPLAINT

Plaintiff Contran Corporation ("Contran"), for its Original Complaint against Defendants The Travelers Indemnity Company (ND), Phoenix Insurance Company (PHX), The Charter Oak Fire Insurance Company (COF), The Travelers Indemnity Company of Illinois (TIL), The Travelers Indemnity Company of Connecticut (TCT) f/k/a Travelers Indemnity Company of Rhode Island (TRI), The Travelers Indemnity Company of America, Travelers Indemnity Company, and St. Paul Travelers n/k/a The Travelers Companies, Inc. (collectively,

“Travelers”), hereby alleges, upon knowledge as to itself and upon information and belief as to all other matters, as follows:

I. NATURE OF THE CASE

1. In this civil action Contran seeks relief against Travelers in the form of a judgment that Contran is not liable for a \$350,000 settlement that Travelers has entered into on behalf of, and without the consent of, Contran as its insured, in violation of a Special Accounts Communication Agreement (the “SAC Agreement”), the insurance policy in question, and relevant Texas statutory law. Travelers has breached the SAC Agreement between Contran and Travelers, the insurance policy in question, and relevant Texas statutory law voiding any obligations that Contran might have for deductible payments to Travelers.

II. JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 because there is diversity of corporate citizenship and the amount in controversy, exclusive of interest, exceeds \$75,000.

3. This action properly lies in the Northern District of Texas, *inter alia*, pursuant to 28 U.S.C. § 1391(a)(2), as a substantial part of the events or omissions giving rise to the claim occurred in this District. In the alternative, if venue is not proper pursuant to 28 U.S.C. § 1391(a)(2), venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a)(3) because one defendant is subject to personal jurisdiction at the time the action is commenced, and there is no district in which the action may otherwise be brought.

III. THE PARTIES

4. Plaintiff Contran Corporation is a Delaware corporation with its principal place of business in Dallas, Texas.

5. Defendants The Travelers Indemnity Company (ND), The Phoenix Insurance Company (PHX), The Charter Oak Fire Insurance Company (COF), The Travelers Indemnity Company of Illinois (TIL), The Travelers Indemnity Company of Connecticut (TCT) f/k/a Travelers Indemnity Company of Rhode Island (TRI), The Travelers Indemnity Company of America, Travelers Indemnity Company, and St. Paul Travelers n/k/a The Travelers Companies, Inc. are insurance companies that are parties to an insurance contract with Contran where at least one of them is registered to do business in Dallas County, Texas.

IV. BACKGROUND

6. Contran was indirectly the former owner of a golf course located on St. Thomas, U.S. Virgin Islands, known as the Mahogany Run Golf Course (the "Golf Course").

7. On or about August 21, 1997, Yoshimi Ohye was riding in a golf cart at the Golf Course when the golf cart she was a passenger in was involved in an accident caused by her then-fiancé, Edward Whalen.

8. Yoshimi Ohye filed a lawsuit captioned *Yoshimi Ohye vs. Contran Resorts, Inc. et al.* TCVI/STT Civil No. 1999-521, in the Territorial Court of the Virgin Islands, Division of St. Thomas and St. John (the "*Ohye* Litigation"), for alleged personal injuries she allegedly sustained at the Golf Course.

V. CAUSES OF ACTION

A. Count One (Declaratory Relief)

9. Paragraphs 1 through 8 are incorporated by reference as if fully set forth herein.

10. For the period January 1, 1997 through January 1, 1998, Contran purchased general liability insurance through Travelers under Commercial General Liability Insurance Policy No. TC2J-GLSA-266T7349-TIL-97, with a \$1 million deductible.

11. Contran and Travelers agreed in writing to the SAC Agreement that governed communications between Contran and Travelers with regard to Insurance Policy No. TC2J-GLSA-266T7349-TIL-97.

12. The SAC Agreement provided as follows:

Pre Settlement Review (LR) – Prior to settling a claim, a detailed case analysis on each proposed settlement of \$10,000.00 or more should be sent to Toni Green by Email. If you can not reach consensus with the customer, contact the CAE for direction.

13. Pursuant to the SAC Agreement, prior to settling a claim, Travelers was required to prepare a detailed case analysis and submit this detailed case analysis to Contran's representative, Toni Green, via email, to achieve consensus.

14. Without preparing a detailed case analysis or submitting a detailed case analysis to Contran's representative, Toni Green, via email, to achieve consensus, representatives of Travelers authorized Mr. James L. Hymes, III, Esq., the attorney hired by Travelers to represent Contran's affiliate, Contran Resorts, Inc., in the *Ohye* Litigation, to settle same for \$350,000.00.

15. In authorizing this settlement, Travelers failed to follow the SAC Agreement in obtaining pre-settlement authority from Contran through its representative, Toni Green, or any other authorized representative.

16. Upon information and belief, and without approval from Contran or its representative, Travelers has now paid \$350,000.00 to settle the *Ohye* Litigation.

17. Contran was not made aware of the \$350,000.00 settlement until after Travelers directed Mr. Hymes to settle the case and had agreed to fund the \$350,000.00 settlement.

18. As a result of failing to follow the SAC Agreement, Travelers has breached its contract with Contran and voided any right to a repayment of any deductible amounts.

19. In a letter dated April 23, 2008, Travelers notified Contran that it intended to sue Contran for all monies it believed Contran owes to Travelers for the *Ohye* Litigation.

20. There is an actual controversy between Contran on the one hand and Travelers on the other hand as to the liability and responsibility for the \$350,000.00 settlement that Travelers authorized with regard to the *Ohye* Litigation without the knowledge or consent of Contran.

21. The controversy between Contran and Travelers is substantial due to the amount of the settlement, \$350,000.00, and the demand by Travelers for \$350,000.00.

22. A declaratory judgment is necessary to avoid a multiplicity of actions in the future arising from Travelers' \$350,000.00 settlement with regard to the *Ohye* Litigation without the consent of Contran.

23. Pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, Contran is entitled to a judicial declaration that Travelers is liable for the \$350,000 settlement that relates to the *Ohye* Litigation, and that Contran has no liability for such amount.

B. Count Two (Breach of Contract)

24. Paragraphs 1 through 23 are incorporated by reference as if fully set forth herein.

25. For the period January 1, 1997 through January 1, 1998, Contran purchased general liability insurance through Travelers under Commercial General Liability Insurance Policy No. TC2J-GLSA-266T7349-TIL-97, with a \$1 million deductible.

26. Contran and Travelers agreed in writing to the SAC Agreement that governed communications between Contran and Travelers with regard to Insurance Policy No. TC2J-GLSA-266T7349-TIL-97.

27. The SAC Agreement provided as follows:

Pre Settlement Review (LR) – Prior to settling a claim, a detailed case analysis on each proposed settlement of \$10,000.00 or more should be sent to Toni Green by

Email. If you can not reach consensus with the customer, contact the CAE for direction.

28. Pursuant to the SAC Agreement, prior to settling a claim, Travelers was required to prepare a detailed case analysis and submit this detailed case analysis to Contran's representative, Toni Green, via email, to achieve consensus.

29. Without preparing a detailed case analysis or submitting a detailed case analysis to Contran's representative, Toni Green, via email, to achieve consensus, representatives of Travelers authorized Mr. James L. Hymes, III, Esq., the attorney hired by Travelers to represent Contran's affiliate, Contran Resorts, Inc., in the *Ohye* Litigation, to settle same for \$350,000.00.

30. In authorizing this settlement, Travelers failed to follow the SAC Agreement in obtaining pre-settlement authority from Contran through its representative, Toni Green, or any other authorized representative.

31. Upon information and belief, and without approval from Contran or its representative, Travelers has now paid \$350,000.00 to settle the *Ohye* Litigation.

32. Contran was not made aware of the \$350,000.00 settlement until after Travelers directed Mr. Hymes to settle the case and had agreed to fund the \$350,000.00 settlement.

33. 'In addition, under the conditions of the general liability insurance policy, Travelers was required to provide written notice to Contran within ten (10) days of an initial offer to compromise or settle a claim and written notice of the settlement not later than thirty (30) days after the date of the settlement, as follows:

The following is added to the DUTIES Condition.

We will notify the first Named Insured in writing of:

1. An initial offer to compromise or settle a claim made or "suit" brought against any insured under this coverage. The notice will be given not later than the 10th day after the date on which the offer is made.

2. Any settlement of a claim made or "suit" brought against the insured under this coverage. The notice will be given not later than the 30th day after the date of the settlement.

34. Travelers failed to provide written notice to Contran within ten (10) days of the offer to settle the claim in violation of the general liability insurance policy.

35. Travelers failed to provide written notice to Contran within thirty (30) days of the settlement of the claim in violation of the general liability insurance policy.

36. As a result of failing to meet the conditions of the SAC Agreement and the general liability insurance policy, Travelers has not met a condition precedent and voided or is otherwise not entitled to any right to a repayment of any deductible amounts.

C. Count Three (Violation of Texas Insurance Code)

37. Paragraphs 1 through 36 are incorporated by reference as if fully set forth herein.

38. Section 542.153 of the Texas Insurance Code required Travelers to provide written notice to Contran within ten (10) days of an initial offer to settle a claim against a named insured and provide written notice within thirty (30) days of a settlement of a claim, as follows:

§ 542.153. NOTICE REQUIRED. (a) Not later than the 10th day after the date an initial offer to settle a claim against a name insured under a casualty insurance policy issued to the insured is made, the insurer shall notify the insured in writing of the offer.

(b) Not later than the 30th day after the date a claim against a named insured under a casualty insurance policy issued to the insured is settled, the insurer shall notify the insured in writing of the settlement.

39. Travelers violated Section 542.153 of the Texas Insurance Code by failing to:
1) provide written notice to Contran within ten (10) days of the initial offer to settle the claim;
and 2) provide written notice within thirty (30) days of the settlement of the claim.

40. Travelers' failure to provide such required notice voided any obligation on the part of Contran to pay any deductible amount.

D. Count Four (Breach of Duty of Good Faith and Fair Dealing)

41. Paragraphs 1 through 40 are incorporated by reference as if fully set forth herein.

42. Under the contracts that Travelers entered into with Contran, Travelers had a duty of good faith and fair dealing. The duty of good faith and fair dealing that Travelers owed Contran under the insurance policy was heightened with regard to the *Ohye* Litigation because there was never any risk that Travelers would be spending its own money in light of the \$1 million deductible. Travelers' failure to notify Contran of its settlement of the *Ohye* Litigation without the consent of Contran is a breach of the duty of good faith and fair dealing.

E. Count Five (Attorneys Fees)

43. Paragraphs 1 through 42 are incorporated by reference as if fully set forth herein.

44. Contran also seeks recovery of its attorney fees and all costs for which recovery is statutorily permitted under TEX. CIV. PRAC. & REM. CODE § 38.001, 28 U.S.C. § 2202, and the Texas Insurance Code.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief:

1. A declaratory judgment against Travelers finding that Contran has no responsibility for the \$350,000.00 settlement that Travelers paid in the *Ohye* Litigation plus all costs, attorneys fees, expenses and interest;
2. Such other and further relief as the Court deems appropriate.

RESPECTFULLY SUBMITTED this 8 day of July, 2008.



Richard A. Sayles

State Bar No. 17697500

E. Sawyer Neely

State Bar No. 24041574

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Counsel for Contran Corporation

OF COUNSEL:

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JS 44 (Rev. 12/07)

ORIGINAL CIVIL COVER SHEET **3-08 CV 1149-K**

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form is approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Contran Corporation, a Delaware corporation

(b) County of Residence of First Listed Plaintiff Dallas
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Richard A. Sayles, Sayles|Werbner, PC
1201 Elm St., Ste. 4400, Dallas, TX 75270, (214)939-8700

DEFENDANTS

THE TRAVELERS INDEMNITY COMPANY (ND), a corporation; THE PHOENIX INSURANCE COMPANY (PHX)

County of Residence of First Listed Defendant Delaware

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

JUL - 8 2008

CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☐ 3 Federal Question (U.S. Government Not a Party)
☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|---------------------------------------|---|---------------------------------------|---------------------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input checked="" type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input checked="" type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input checked="" type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. § 2201

Brief description of cause:

Insurance company settled case without approval of insured and violated contract between them

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMAND \$
 350,000.00

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

07/08/2008

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE